

**FEDERAL COURT OF AUSTRALIA**

**Ahadi v Minister for Immigration & Multicultural Affairs [1999] FCA 1418**

**MOHAMMED REZA AHADI v MINISTER FOR IMMIGRATION &  
MULTICULTURAL AFFAIRS**

**N590 of 1999**

**WILCOX J  
8 OCTOBER 1999  
SYDNEY**

**IN THE FEDERAL COURT OF AUSTRALIA  
NEW SOUTH WALES DISTRICT REGISTRY**

**N590 of 1999**

**BETWEEN:           MOHAMMAD REZA AHADI**  
**Applicant**

**AND:                MINISTER FOR IMMIGRATION AND MULTICULTURAL**  
**AFFAIRS**  
**Respondent**

**JUDGE:             WILCOX J**

**DATE:               8 OCTOBER 1999**

**PLACE:             SYDNEY**

**THE COURT ORDERS THAT:**

1.     The application be dismissed.
2.     The applicant pay the costs of the respondent.

Note: Settlement and entry of orders is dealt with in Order 36 of the Federal Court Rules.

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**Applicant**

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**EXTEMPORE REASONS FOR JUDGMENT**

1     **WILCOX J:** This is an application to review a decision of the Immigration Review Tribunal.

2     The applicant, Mohammad Reza Ahadi, applied for a visa, a condition of which is that he demonstrate he was the spouse of a person who was an Australian citizen or Australian resident. The case he propounded was that he was the de facto spouse of Mitra Pourzinal, who has been an Australian citizen since August 1994. Ms Pourzinal was apparently born in Iran, as was Mr Ahadi. The two people met in about 1989. They had, apparently, been friends for some time before, according to their evidence, they entered into a sexual relationship sometime towards the end of 1995 or early in 1996.

3     Regulation 1(15A) sets out what is necessary for a person to establish that he or she is the spouse of another person: That regulation reads as follows:

*“(1) For the purposes of these Regulations, a person is the spouse of another person if:*

*(a) the 2 persons are:*

- (i) married to each other under a marriage that is recognised as valid for the purposes of the Act; or*
- (ii) de facto spouses of each other, as set out in subregulation (2);*

*and*

- (b) the Minister is satisfied that:*
    - (i) the 2 persons have a mutual commitment to a shared life as husband and wife to the exclusion of all others; and*
    - (ii) the relationship between the 2 persons is genuine and continuing; and*
  - (c) the Minister is satisfied that the 2 persons are:*
    - (i) living together; or*
    - (ii) not living separately and apart on a permanent basis.*
- (2) A person is the de facto spouse of another person:*
- (a) if the persons:*
    - (i) are of opposite sexes; and*
    - (ii) are not married to each other under a marriage that is recognised as valid for the purposes of the Act; and*
    - (iii) are not within a relationship that is a prohibited relationship for the purposes of subsection 23B(2) of the Marriage Act 1961; and*
  - (b) if:*
    - (i) either of the persons is domiciled in Australia – both of them have turned 18; or*
    - (ii) neither of the persons is domiciled in Australia – both of them have turned 16.*
- (3) In forming an opinion for the purposes of paragraph (1)(b) and (c) in relation to an application for a visa of subclass 100, 801, 820 or 831, the Minister must have regard to all the circumstances of the relationship, including, in particular:*
- (a) the financial aspects of the relationship, including:*
    - (i) any joint ownership of real estate or other major assets; and*
    - (ii) any joint liabilities; and*
    - (iii) the extent of any pooling of financial resources, especially in relation to major financial commitments; and*
    - (iv) whether one party to the relationship owes any legal obligation in respect of the other; and*
    - (v) the basis of any sharing of day-to-day household expenses;*
  - (b) the nature of the household, including:*

- (i) *any joint responsibility for care and support of children, if any; and*
  - (ii) *the parties' living arrangements; and*
  - (iii) *any sharing of responsibility for housework;*
- (c) *the social aspects of the relationship, including:*
  - (i) *whether the persons represent themselves to other people as being married or in a de facto relationship with each other;*
  - (ii) *the opinion of the persons' friends and acquaintances about the nature of the relationship; and*
  - (iii) *any basis on which the persons plan and undertake joint social activities;*
- (d) *the nature of the persons' commitment to each other, including:*
  - (i) *the duration of the relationship; and*
  - (ii) *the length of time during which the persons have lived together; and*
  - (iii) *the degree of companionship and emotional support that the persons draw from each other; and*
  - (iv) *whether the persons see the relationship as a long-term one.*
- (4) *In forming an opinion for the purposes of paragraph (1)(b) and (c) in relation to an application for a visa of a subclass other than 100, 801, 820 or 831, the Minister may have regard to any of the factors set out in subregulation (3).*
- (5) *If a person has been living with another person for 6 months or longer, that fact is to be taken to be strong evidence that the relationship is genuine and continuing, but a relationship of shorter duration is not to be taken not to be genuine and continuing only for that reason."*

4 There is no difficulty, from the applicant's point of view, in relation to sub-regulation (2). The critical question for the Tribunal was whether it ought to be satisfied of the matters set out in paras (b) and (c) of sub-regulation 1. The Tribunal member was not so satisfied and, for that reason, she dismissed the visa application.

5 Three submissions were put in support of the application for review. The first submission was that the Tribunal misdirected itself in law in holding it was necessary that a person claiming to be a spouse demonstrate cohabitation prior to the lodgement of the visa application.

- 6 Mr David Godwin, counsel for the applicant, drew attention to sub-regulation (5). He pointed out this does no more than provide that cohabitation for six months or longer is to be taken as strong evidence that the relationship is genuine and continuing; the sub-regulation specifies that a relationship of shorter duration is not to be taken not to be genuine and continuing only for that reason. He said it is unnecessary for an applicant to demonstrate any particular period of cohabitation.
- 7 I agree with this interpretation of the regulation, but I do not think the Tribunal member thought otherwise. It is true there is a paragraph, close to the end of the reasons, in the following terms:

*“The Tribunal finds, then, that at the time his application on 22 March 1996, Mr Ahadi was not the spouse of his Australian citizen nominator, Ms Mitra Pourzinal because their relationship had existed for a maximum of two months and possibly for as little as two weeks so he did not meet the definition of de facto spouse at 1.15(A) of the Migration Regulations and did not meet the requirements of 820.211(2).”*

If this passage stood alone, it would be arguable - perhaps strongly arguable - that the Tribunal member erroneously thought it was necessary for the applicant to demonstrate that a relationship had existed for a particular period of time before the making of the visa application, in order to meet the definition of de facto spouse. However, the passage does not stand alone. At an earlier point of the reasons, although still in the section headed "Findings and Reasons", the Tribunal said this:

*“Even if the Tribunal accepts Mr Ahadi's claim that their sexual relationship started two or three months prior to lodging the application, at the time when he says Ms Pourzinal first moved in with him, and her assertion that the sexual relationship commenced when they started living together, ahead of putting things into joint names at the time of application, this period falls far short of the six month period referred to in 1.15(A)(5) as providing strong evidence of a genuine and continuing relationship.*

*The Tribunal is aware that 1.15(A)(5) also notes that a relationship of shorter duration should not be taken not to be genuinely continuing solely for that reason, but it seems likely that in this case the decisions to live together and to lodge a spouse application made at the same time in March 1996. If that is*

*the case, the couple involved had not been living together for any period of time when Mr Ahadi applied, although they may have embarked upon a sexual relationship some weeks earlier. They appear not to have been de facto spouses with a mutual commitment to a shared life as husband and wife to the exclusion of all others and the relationship between them had only just begun when Mr Ahadi applied, rather than being genuine and continuing. In addition, such matters as joint financial arrangements had started only two weeks earlier than the lease to which Ms Pourzinal's name had been added and which was dated 23 March 1996, commencing on 29 March 1996.*

- 8 It seems to me, in this passage, the Tribunal member demonstrated her awareness that no particular period of cohabitation is required in order to establish the existence of a genuine and continuing relationship. She also made the point that, where it is not possible for parties to demonstrate a history of cohabitation, this will affect the possibility that they can establish the existence of a genuine and continuing relationship. I see no error in that observation; cohabitation is one of the basic ingredients of a genuine spousal relationship.
- 9 It is true, as Mr Godwin pointed out, that para (c) of regulation 1(15A)(1) contemplates the possibility that the two persons are not living together, provided they are "not living separately and apart on a permanent basis". I suppose this provision was inserted to cover cases where people, who are genuine spouses in every sense of the word and would like to live together, are forced to be apart; for example, one of them is not entitled to be in Australia or they are separated by work requirements or other exigencies. Cohabitation is not the be all and end all of a determination about a spousal relationship; but it is, clearly, a most important matter. I think this is what the Tribunal member recognised in the passage in her reasons I have quoted.
- 10 Another matter that persuades me the Tribunal member did not fall into the error ascribed to her is that she went to some pains to deal with other aspects of the evidence. She referred, for example, to the fact that the parties had made separate journeys to Iran after March 1996; plainly she thought this was somewhat odd, if they were cohabiting. It was odd they did not choose to travel together, at least in the absence of some explanation of that decision. The Tribunal also referred to the lack of documentation of matters pertaining to cohabitation between March 1996 and early 1999, and her doubts as to where they had spent those three years. There were also other matters, such as the paucity of the evidence, in the eyes of the Tribunal member, about the way in which the two persons were perceived by friends in the

Irani community. If the Tribunal member had thought it was fatal to his application that the applicant could not demonstrate a history of cohabitation before 22 March 1996, it would have been pointless to go into these matters.

11 The Court has said, on many occasions, that the reasons of decision makers, such as members of the Immigration Review Tribunal, are not to be analysed with an eye keen to find fault; they are to be read fairly, and as a whole, in order to determine whether the decision maker truly fell into an error of law. When one reads the full decision in the present case, there can be no doubt the Tribunal member understood it was not necessary to establish a particular period of cohabitation prior to the lodgement of the application. The error of law attributed to the Tribunal by the first submission is not made out.

12 The second submission was based upon the terms of s 368 of the *Migration Act* 1958. That section applies to the Immigration Review Tribunal and it requires that, where the Tribunal makes its decision on a review, it shall, amongst other things, set out "the findings on any material questions of fact". Mr Godwin submitted the Tribunal failed to set out findings on material questions of fact. He helpfully provided me with a table in which he indicated references to the points at which various matters of fact were referred to in documents put before the Tribunal. This document also gave references to findings, where they occurred, in relation to those matters.

13 I went through the table with Mr Godwin during the course of his submissions. I am unpersuaded there is any material matter which fails to find its way into the reasons for decision. The reasons resort to summary in some places, but there is nothing improper about this. It seems to me they fairly reflect each of the matters set out on the table. Perhaps other matters were put before the Tribunal during the course of the oral evidence given by Mr Ahadi and Ms Pourzinal and the two witnesses who spoke about their relationship. The transcript of the hearing is not available and I have no way of knowing whether that is the case. Mr Godwin was not able to identify any such matter.

14 Mr Godwin also made the submission that the requirement of regulation 1(15A)(3), that the Minister (and therefore the Tribunal) "have regard" to all the circumstances including the specified matters, means the Tribunal is bound to make inquiry about these matters even if nothing about them is put by the applicant himself.



15 I see the force of this submission but I think its application has to take account of the circumstances. In the present case, the applicant was represented by a migration agent. The Tribunal member was in a position to evaluate the performance of the migration agent and to determine whether all relevant matters were being put before her. If she was satisfied about that, there would have been little, if any, necessity to ask questions going beyond what was being put. If the Tribunal member was unhappy about the adequacy of the material put before her, then I think she had a duty to ask some questions. Whether that position occurred in the present case and, if so, how it was handled, I simply do not know.

16 On the assumption the material put before the Tribunal was limited to what is set out in the reasons, it seems scant; it raises obvious questions. However, for all I know, the Tribunal member may have endeavoured to obtain more information but have been unable to obtain meaningful answers. Without the transcript, I cannot evaluate the suggestion that the Tribunal member failed to make sufficient inquiry.

17 It seems to me none of the grounds argued before the Court can succeed. The application for review must be dismissed.

[There was discussion about costs.]

18 The order of the Court is that the application be dismissed and the applicant pay the costs of the respondent.

I certify that the preceding eighteen (18) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Wilcox.

Associate:

Dated: 8 October 1999

Counsel for the Applicant: D Godwin

Solicitor for the Applicant: Parish Patience

Counsel for the Respondent: M Leeming

Solicitor for the Respondent: Australian Government Solicitor

Date of Hearing: 8 October 1999

